BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ARNALDO SANABRIA	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,026,999
WAL-MART WAREHOUSE	)	& 1,027,000
Respondent	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the June 13, 2006 preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh. Claimant was denied additional medical treatment and payment of medical bills allegedly associated with either the injuries claimed on September 6, 2005, or the injuries claimed on October 13, 2005.

ISSUES

Claimant raised the following issues in his Application For Appeals Board Review And Docketing Statement filed with the Board:

1. Whether claimant met with personal injury by accident, and the appropriate date of any alleged accident.

2. Whether claimant's alleged injuries arose out of and in the course of his employment.

3. Whether the Administrative Law Judge (ALJ) exceeded his jurisdiction in entering an Order denying additional medical treatment for claimant and in denying payment of medical bills as authorized medical.

Respondent denied that claimant suffered accidental injury arising out of and in the course of his employment for both dates of accident. The ALJ, after finding claimant's testimony "evasive" and his emerging symptoms as "suspicious", denied claimant added medical treatment for his injuries. The ALJ concluded that the referral to orthopedic surgeon Michael M. Hall, M.D., had already accomplished claimant's request for an

examination by an upper extremity orthopedic specialist. Added medical treatment was then denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the ALJ should be affirmed.

Claimant worked in respondent's warehouse in Ottawa, Kansas, as a laborer. On September 6, 2005, while unloading a trailer, handling boxes weighing between 50 to 60 pounds, he experienced a strong pain in the right side of his chest and in his left arm. Claimant testified that he lost consciousness. He was transported to the emergency room at Ransom Memorial Hospital in Ottawa, Kansas. There, he underwent a series of tests to determine whether he had experienced a cardiac episode. All tests were reported normal. After a short period, the exact length of which is not clear in this record, claimant was returned to work with respondent, performing his regular duties. The medical evidence in this record indicates that claimant's recovery from this incident was complete. Even C. Reiff Brown, M.D., claimant's expert, found claimant to be asymptomatic from this incident. The Board cannot find that claimant's request for added medical treatment is associated, in any way, with this injury.

On October 13, 2005, while performing his regular duties, claimant again experienced pain in his upper chest, as well as pain in both shoulders, with the right shoulder pain being the worst. Claimant was again referred for medical treatment, as well as physical therapy. Claimant was examined and treated by several specialists. Katherine J. Southall, M.D., of the Olathe Occupational Medicine Clinic, first examined claimant on October 18, 2005, diagnosing bilateral pectoralis strain. By October 25, 2005, claimant's symptoms were across his bilateral pectoralis with occasional radiation to his right elbow. Claimant was again diagnosed with bilateral pectoralis strain and some component of right biceps tendinitis. By the November 4, 2005 examination, claimant still had bilateral pectoralis tenderness, but the referred pain into the right arm was not mentioned. Claimant told Dr. Southall that a period of physical therapy had increased his pain. The impression of bilateral pectoralis strain remained.

At the November 8, 2005 examination, claimant described terrible pain across his anterior chest and shoulders. Dr. Southall noted an exaggeration of subjective findings compared to objective findings. The arm pain was again absent. On November 10, 2005, claimant was seen at the Olathe Occupational Medicine Clinic by Charles O. Smith, M.D. At the November 10 examination, Dr. Smith diagnosed a chest wall strain and returned claimant to modified duty, limiting claimant's lifting to no more than 15 to 20 pounds.

Dr. Smith next examined claimant on November 17, 2005, at which time he presented with pain down his right arm into his hand. This included tingling and numbness,

which claimant reported had been bothering him for over one month, even though it had, to this point, not been mentioned. He reported the chest wall pain was "better". Dr. Smith's conversation with Kerri Wilson, the physical therapist, indicated that claimant had complained to her of these symptoms several weeks ago. Dr. Smith referred claimant for an EMG of his right upper extremity. Vito J. Carabetta, M.D., performed the EMG study on November 29, 2005. The tests indicated a limited case of carpal tunnel syndrome on the right side. Dr. Smith, in his notes of November 30, 2005, indicated subjective complaints far out of line, with a lack of clinical findings on examination. Dr. Smith reported that Dr. Carabetta, in a conversation with Dr. Smith, felt strongly that the carpal tunnel syndrome was not the cause of claimant's proximal symptoms and was just an incidental finding. However, because of claimant's ongoing shoulder complaints, Dr. Smith elected to refer claimant for an orthopedic evaluation of the shoulder.

This referral was accomplished on December 21, 2005, when claimant was examined by orthopedic surgeon Michael M. Hall, M.D. Dr. Hall's report of that date describes a laborious examination, with multiple questions being raised. On more than one occasion, he describes claimant's history as being difficult to follow, and stated that an honest history should not be so confusing. He also said claimant's physical examination "does not make any sense."[1] Dr. Hall found nothing wrong with claimant, but stated if anything was wrong, it was not sustained on the job.

Claimant was referred by his attorney to board certified orthopedic surgeon C. Reiff Brown, M.D., who saw claimant on February 13, 2006. Dr. Brown's history was consistent with the two injuries above described. As noted above, in Dr. Brown's opinion, the September 6, 2005 injury had subsided completely and remained asymptomatic at the time of the February 13 examination. Dr. Brown found no need for additional treatment for that injury.

Dr. Brown opined that the October 13, 2005 injury resulted in rotator cuff tendonitis and acromial impingement syndrome on the right. He also diagnosed right carpal tunnel syndrome, although he stated it was from work activities and not specifically from the October injury. Added treatment on the right shoulder and wrist, as well as an MRI of the right shoulder, was recommended.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[2]

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[1] P.H. Trans, Resp. Ex. B.

[2] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[4]

An administrative law judge is in the enviable position on many occasions of being able to observe witnesses testify at hearing. This allows the administrative law judge to ascertain the credibility of those witnesses. Here, the testimony and complaints of the claimant have been questioned not only by the ALJ, but also by more than one of the health care providers who had occasion to examine him. The ALJ, in the Order, found claimant's testimony to be evasive and certain symptoms were described as suspicious. It is apparent from the Order that the ALJ questioned claimant's credibility, and the Board agrees. The Board affirms the ALJ's denial of benefits, finding claimant has failed to prove that his current need for medical treatment is related to the injuries described in claimant's testimony.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Kenneth J. Hursh dated June 13, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September, 2006.

BOARD MEMBER

c: Diane F. Barger, Attorney for Claimant
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).